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Supreme Court, U.S.
FILED
JUN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1759

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

KENNETH WOOD, et al.,
Petitioners

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, KROGER COMPANY AND HAMADY BROTHERS FOOD MARKETS, INC.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT KROGER COMPANY BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners framed six questions for review by this Court in their Petition For Writ of Certiorari (Petition For Certiorari, pp. i-ii). Questions three and four pertain to Petitioners' action against the Respondent Union and question six pertains to their action against Respondent Hamady Brothers Food Markets, Inc. Respondent Kroger Company does not address those questions.

Questions one, two and five in the Petition For Writ of Certiorari bear on Petitioners' action against Respondent Kroger Company and are addressed herein. As framed by Petitioners, however, these questions are inappropriately stated because they ignore the fact that the Sixth Circuit Court of Appeals decision was not issued in a vacuum but is predicated on the record made in this case. Accordingly, Respondent Kroger Company restates the questions presented vis-a-vis Petitioners' action against it as follows:

1. In a hybrid § 301 action, can a district court entertain an action against an employer for claimed breach of a collective bargaining agreement when a labor arbitration award has been issued in favor of the employer and there is no finding that the award is erroneous and no evidence that the union's breach of duty of fair representation tainted the arbitrator's decision?

2. When there is no evidence that a labor arbitration award was tainted by the union's breach of duty of fair representation and the plaintiffs-employees were fully represented by their own attorneys in the arbitration hearing, can a court conclude that the union's breach of duty of fair representation did not taint the arbitrator's decision?

3. In a hybrid § 301 action when a labor arbitration award stands between the plaintiffs-employees and a judicial remedy against the employer, are the plaintiffs-employees entitled to a jury trial on their action against the employer when there is no finding that the arbitration award is erroneous and absent any evidence that the arbitrator's award was tainted by the union's breach of duty of fair representation?

*Respondent Kroger Company's parents, subsidiaries and affiliates (except wholly owned subsidiaries) are: HSI, Inc., a Delaware Corporation (owner of 30% of its stock); Foodland Distributors, a partnership between it and Witterau, Inc., a St. Louis, Mo. Wholesale Company (50% partner); and Irvine Ranch Farmers Market, Inc., a California Corporation (30% of its stock).

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IN THE
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Respondents.

RESPONDENT KROGER COMPANY BRIEF IN OPPOSITION

Respondent Kroger Company respectfully submits that this Court should deny the Petition For Writ of Certiorari seeking review of the Sixth Circuit Court of Appeals decision in this case because there are no special or important reasons for granting certiorari according to the considerations governing review on certiorari as set forth in Rule 17 of the Rules of this Court.

STATEMENT OF THE CASE

This case presents a hybrid action grounded on § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Petitioners brought an action claiming, *inter alia*, entitlement to damages against Respondent Kroger Company, their former employer, for alleged breach of a collective bargaining agreement and against the Respondent Union for alleged breach of the duty of fair representation. The facts material to consideration of the Petition

For Certiorari are set forth in the opinion of the Sixth Circuit Court of Appeals[1] and are set forth below.[2]

This case arose out of Respondent Kroger Company's ("Kroger") lease/sale of a grocery warehouse to Hamady Brothers Food Markets, Inc ("Hamady"). Appendix, p. 2a. The transaction between Kroger and Hamady was an arms length transaction. Appendix, p. 12a. Petitioners were employed by Kroger at the time of the sale of the warehouse to Hamady and were covered under a collective bargaining agreement between Kroger and Respondent, Teamsters Local 406 (the "Union"). Appendix, pp. 2a-3a. The collective bargaining agreement provided that "[T]his Agreement shall be binding not only upon the parties but upon their successors and assigns." Appendix, p. 3a. It also established a grievance procedure, which was the exclusive mechanism for resolving disputes over the interpretation or application of the contract. The final and binding step of the grievance procedure was arbitration. Appendix, p. 3a.

The Kroger warehouse was a failing business,[3] and Hamady refused to assume the Kroger collective bargaining agreement when it purchased the warehouse assets. Appendix, p. 4a. Hamady did, however, hire approximately half of the former Kroger employees, but did not hire in order of seniority. Appendix, p. 4a. Hamady also recognized the Union as the exclusive bargaining agent for its new employees and entered into a collective bargaining agreement with the Union covering the warehouse. Appendix, p. 4a-5a.

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[1] *Wood, et al. v. International Brotherhood of Teamsters, etc., Local 406, et al.*, Appendix, pp. 1a-22a; 807 F.2d 493 (6th Cir. 1986).

[2] Petitioners' Statement of Facts is not accompanied by any citations to the record or opinions below and is a self-serving argumentative narrative. Petitioners so-called Statement of Facts is premised on the paralogism that because the jury rendered a verdict in their favor, it may be assumed that the jury found all the facts to be as argued by Petitioners.

[3] Due to unfavorable economic conditions, Hamady ceased operations within one year after it acquired the warehouse. Appendix, p. 4a, n.2.

Petitioners filed an action claiming that: (1) the Union breached its duty of fair representation, (2) Kroger had breached the collective bargaining agreement by failing to bind Hamady to the agreement and (3) Hamady was liable to assume the collective bargaining agreement as a "successor" to Kroger. Appendix, p. 5a. The district court on motion of the Union ordered Kroger and Hamady to arbitrate the issues. It also ordered that Petitioners be allowed to have their own spokesperson participate in the arbitration proceedings. Appendix, p. 5a.

The arbitration hearing lasted four days. Petitioners were represented by the Union and by their own attorneys, who participated fully in the hearing. Petitioners' attorneys presented witnesses, cross-examined witnesses of the other parties and submitted briefs. Appendix, p. 6a. The arbitrator issued an opinion and award interpreting the "successors and assigns" provision in the collective bargaining agreement. The arbitrator found that Hamady was not a "successor" to Kroger and that the collective bargaining agreement did not obligate Kroger to require Hamady to assume the Kroger labor agreement as a condition of the asset sale to Hamady.[4] Appendix, p. 6a. The arbitration decision and award was final and binding in accordance with the express terms of the collective bargaining agreement. Appendix, p. 6a.

After the arbitration award issued, Petitioners moved for a jury trial in the district court. The district court denied Kroger's motions to strike the jury trial demand and for summary judgment. Appendix, p. 6a. The case proceeded to trial before a jury on the issues of liability of Kroger, the Union and Hamady. At the conclusion of Petitioners' proofs, the district court granted Hamady's motion to dismiss on the ground that Hamady was not a "successor" to Kroger and was not obligated to assume Kroger's collective bargaining agreement. Appendix, p. 6a-7a.

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[4]The arbitrator's opinion and award is published in 78 Lab. Arb. (BNA) 589 (1982) (Howlett, Arb.).

At the conclusion of the trial, the district court instructed the jury that if they found that the Union breached its duty of fair representation undermining the arbitral process, then the jury, notwithstanding the arbitrator's decision and award, could proceed to interpret the collective bargaining agreement and determine whether Kroger had breached the agreement. Appendix, pp. 7a-8a. The jury found that the Union had breached its duty of fair representation in the arbitration process. Absent any finding that the arbitrator's decision was erroneous, the district court then permitted the jury to substitute its interpretation of the collective bargaining agreement for that of the arbitrator. The jury held that Kroger was obligated to require Hamady to assume the agreement when Kroger sold the warehouse to Hamady. Appendix, p. 8a.

The district court denied motions of Kroger and the Union for judgment notwithstanding the verdict. Appendix, p. 8a. Thereafter on the petitions of Kroger and the Union, the district court certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and the Sixth Circuit granted permission to appeal. Appendix, pp. 8a-9a. Kroger raised three claims on appeal. First, Kroger contended that the district court erred in failing to strike Petitioners' jury demand, thus allowing the jury to substitute its interpretation of the collective bargaining agreement for that of the arbitrator. Second, Kroger asserted that the arbitration award could not be set aside unless there is a finding that the Union's breach of duty of fair representation tainted the arbitrator's decision. Third, Kroger claimed that the district court erred in failing to instruct the jury on the interpretation of the term "successor" under federal labor law. Appendix, pp. 12a-13a. The Sixth Circuit did not reach Kroger's first and third claims. Appendix, p. 13a.

Applying this Court's holding in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 524 (1976), the Sixth Circuit held that the arbitrator's award could not be set aside unless there was a finding that the Union breached its duty of fair representation in the arbitral process and a finding that the breach of duty by the Union tainted the arbitrator's decision. Appendix, p. 13a. The court

found that there was "no evidence" that the Union's breach of duty of fair representation tainted the outcome of the arbitration proceeding. Appendix, p. 14a. Accordingly, the Sixth Circuit reversed the district court's denial of Kroger's motion for judgment n.o.v. and remanded the case with direction to confirm the arbitrator's award. Appendix, pp. 13a, 15a-16a, 19a.

Petitioners seek to portray this case as one of precedential significance. It is clearly not such a case. The Sixth Circuit simply applied legal principles established by this Court in disposing of a case which was erroneously decided in the district court as a matter of law.

SUMMARY OF ARGUMENT

This is a so-called hybrid § 301 action wherein Petitioners brought an action against the Union for breach of the duty of fair representation and against Kroger for alleged breach of a collective bargaining agreement. Prior to trial before the district court, Petitioners' claim against Kroger was submitted to final and binding arbitration. The arbitrator ruled that Kroger did not breach the collective bargaining agreement. On the record made in this case, there is no finding that the arbitrator's decision was erroneous and the Sixth Circuit Court of Appeals found that there is no evidence that the Union's breach of duty of fair representation in the arbitration process tainted the arbitrator's decision.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) this Court held that when, as here, a labor arbitration award stands between the plaintiffs-employees and a judicial remedy against an employer for alleged breach of a collective bargaining agreement, the plaintiffs-employees must prove that the arbitrator's award was erroneous and that the union's breach of duty of fair representation tainted the arbitrator's decision to be entitled to a remedy against either the employer or the union. *Hines, supra*, 424 U.S. at 572. The Sixth Circuit Court of Appeals correctly held that pursuant to the holding in *Hines, supra*, and on

the record in this case Petitioners were not entitled to a judicial remedy against either Kroger or the Union.

Whether Petitioners were entitled to a jury trial of their actions against Kroger and the Union in this case is academic. Petitioners were not entitled to reach the merits of their action against Kroger unless the district court could set aside the arbitration award. There was no basis on which the arbitration award could be set aside and, accordingly, Petitioners were not entitled to a jury trial and could not prevail on the merits of their claims against either Kroger or the Union. *Hines, supra,* 424 U.S. at 570-571.

ARGUMENT
REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

THE HOLDING OF THE SIXTH CIRCUIT COURT OF APPEALS COMPORTS WITH THE DECISION OF THIS COURT IN *HINES V. ANCHOR MOTOR FREIGHT, INC.*, AND IS NOT IN CONFLICT WITH THE DECISION OF ANY COURT OF APPEALS

In this action, Petitioners sought a judicial remedy against the Union for alleged breach of the duty of fair representation and against Kroger for alleged breach of the collective bargaining agreement. Petitioners' claim against Kroger turned on the interpretation and application of the terms of the collective bargaining agreement between Kroger and the Union. Prior to the trial before the district court, Petitioners' claim against Kroger was resolved in an arbitration proceeding ordered by the court. The arbitrator interpreted the collective bargaining agreement and ruled that Kroger did not breach the agreement by not requiring Hamady to assume the agreement when Hamady purchased the warehouse assets.

Petitioners' claims against the Union and Kroger, while interrelated, are conceptually separate and distinct. The claim

against Kroger is in effect an action to set aside the arbitrator's award. *United Parcel Service v. Mitchell*, 451 U.S. 56, 62, 72 (1981) (Stevens, J., concurring in part and dissenting in part); *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 157 (1983).

Petitioners fail to comprehend the critical fact that in the context of this case "an arbitrator's award stands between the employee [Petitioners] and any relief which may be awarded against the Company [Kroger]." *Mitchell, supra*, 451 U.S. at 62, n. 4. The arbitrator's decision turned on the interpretation of the collective bargaining agreement. The question of interpretation of the collective bargaining agreement is a question for the arbitrator and "the courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Accordingly, unless the Union's breach of duty of fair representation tainted the arbitrator's decision, neither a court nor a jury can overrule the arbitrator's award and entertain a remedy against Kroger. *Hines, supra*, 424 U.S. at 572; *Steelworkers, supra*, 363 U.S. at 596, 598-599.

The collective bargaining agreement here involved provided that the arbitration award is final and binding. Appendix, p. 3a. Ordinarily such a binding arbitration clause guarantees the finality of a labor arbitration award unless the award does not draw its essence from the collective bargaining agreement. *Steelworkers, supra*, 363 U.S. at 596-599; *W.R. Grace & Co. v. Local 759, Rubber Workers, etc.*, 461 U.S. 757 (1983). In *Hines v. Anchor Motor Freight, Inc., supra*, however, this Court carved out a limited exception to the rule of arbitral finality permitting judicial review of a labor arbitration award when the union's breach of duty of fair representation undermines the integrity of the arbitration process.

The *Hines v. Anchor Motor Freight, Inc.*[5] Exception To The Rule of Arbitral Finality

In *Hines*, *supra*, certiorari was granted on the question of whether a joint grievance committee's decision upholding the petitioners' discharge for alleged dishonesty barred their suit against their former employer for wrongful discharge when the union breached its duty of fair representation in processing the grievances so as to deprive the petitioners and the grievance committee of overwhelming evidence of the petitioners' innocence. *Hines*, *supra*, 424 U.S. at 561, n. 7. This Court held that when the union's breach of duty seriously undermines the integrity of the arbitral process, the usual bar of finality of the arbitration award is removed. *Hines*, *supra*, 424 U.S. at 567. Once the bar of finality is removed, the arbitration decision is then reviewable and the focus is "on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the *erroneous outcome* of the contractual proceedings." *Hines*, *supra*, 424 U.S. at 568. Emphasis added.

The focal point of the Court's concern and its holding in *Hines*, *supra*, was the extent to which *erroneous* arbitration decisions should be insulated by the rule of arbitral finality. *Hines* "rejected the suggestion that 'erroneous arbitration decisions must stand in the face of a union's breach of its duty.' " *Mitchell*, *supra*, 451 U.S. at 61. The Court stated that the grievance process cannot be expected to be error free, but it is quite another matter to suggest that "erroneous arbitration decisions" must stand even though the union's representation has been dishonest, in bad faith or discriminatory. *Hines*, *supra*, 424 U.S. at 571. Thus, the Court held that:

> Petitioners, if they prove an *erroneous* discharge [i.e., the joint grievance committee erred in its decision] *and* the Union's breach of duty *tainting the decision* of the joint

[5]424 U.S. 554 (1976).

> committee, are entitled to an appropriate remedy against the employer . . . *Hines, supra*, 424 U.S. at 572 (Emphasis added).

Applying the holding of *Hines, supra*, to the instant case, in order to be entitled to a remedy against Kroger and avoid the finality otherwise attaching to the arbitrator's decision, Petitioners were required to prove that the arbitrator's interpretation of the collective bargaining agreement was erroneous and that the Union's breach of the duty of fair representation tainted the decision of the arbitrator. Petitioners do not even contend that the arbitrator's interpretation of the collective bargaining agreement is erroneous, and the Sixth Circuit found that there is "no evidence" to support a finding that the Union's breach of duty tainted the arbitrator's decision. Appendix, p. 14a.

Petitioners' argument is bottomed on a misreading of *Hines, supra*. They erroneously contend that a mere showing that a union breached its duty of fair representation in the arbitral process is sufficient to set aside a labor arbitration award without regard to whether the arbitrator's decision is erroneous and without regard to whether the Union's breach of duty of fair representation tainted the arbitrator's decision.

If a union breaches its duty of fair representation in the arbitral process, it does not follow that the employer breached the collective bargaining agreement and that the arbitrator's decision is erroneous. *Mitchell, supra*, 451 U.S. at 73, n. 4 (Stevens, J., concurring in part and dissenting in part); *McNaughton v. Dillingham Corp.*, 707 F. 2d 1042, 1048 (9th Cir. 1983). There is no holding or suggestion in *Hines, supra*, that a mere showing that the union breached its duty of fair representation in the arbitral process voids the arbitrator's award per se and permits the court to entertain a suit against the employer. The Sixth Circuit correctly interpreted and applied this Court's holding in *Hines, supra*, in the instant case.

The Sixth Circuit's Decision Is Not In Conflict With The Decision Of Any Other Circuit Court Of Appeals

Petitioners argue that the Sixth Circuit's decision is at odds with "decisions" of the First, Second, Fifth, Seventh, Eighth and Tenth Circuit Courts of Appeals. Their argument is constructed by excising statements from six cases and misapplying them out of context. Even a cursory review of the actual "decisions" in the cases cited by Petitioners demonstrates that their argument is fallacious.

Petitioners' contention that the decision in *Santos v. District Council of New York City, etc.*, 547 F. 2d 197 (2nd Cir. 1977) is in conflict with the Sixth Circuit decision in this case is utterly fatuous. One need read no further than the first sentence in the Court's opinion to discern that *Santos* is inapposite to the instant case. As stated by the Court, *Santos* was "a case of first impression" presenting "the issue whether members of one union may sue another union for failure to comply with an arbitral decree made pursuant to a labor federation's constitutional provision pertaining to interunion jurisdictional disputes." *Santos, supra*, 547 F. 2d at 198.

Petitioners erroneously assert that *Santos* supports their claim that a labor arbitration award, without regard to whether it is erroneous, can be set aside solely on the basis of a finding that the union breached its duty of fair representation in the arbitration process. No such claim was even presented or ruled on in *Santos*. The court expressly noted that the appellants did not seek and had no reason to seek to set aside the arbitration award. *Santos*, 547 F. 2d at 201.

By analogy to *Hines v. Anchor Motor Freight, Inc.*, the *Santos* court held only that appellants' allegations of the union's breach of duty of fair representation were sufficiently serious to withstand a motion for summary judgment and enable the court to entertain an action against the union. *Santos, supra*, 547 F. 2d at 202. In *Santos*, there was no remedy sought against any

employer, no claimed breach of a collective bargaining agreement and no attempt to set aside an arbitration award. There is patently no conflict between the decision in *Santos* and the Sixth Circuit's decision in this case.

The claim of Petitioners that the decision of the Sixth Circuit is opposed to the decision in *Barnett v. United Air Lines, Inc.*, 738 F. 2d 358 (10th Cir. 1984), *cert denied*, 469 U.S. 1087 (1984) exhibits a careless inattention to the actual holding in *Barnett*. In *Barnett*, an arbitration board established under the Railway Labor Act denied appellant's grievance protesting an adjustment in his seniority status. The appellant brought an action against the union and the employer seeking to vacate the arbitration award. The district court granted summary judgment in favor of the union and the employer on the grounds that the action was barred by the Colorado statute of limitations.

The only issues presented on appeal in *Barnett*, as stated in the court's opinion, were "(1) whether the district court erred in applying the ninety day Colorado statute of limitations and (2) whether Barnett timely filed this action under the applicable statute." *Barnett, supra*, 738 F. 2d at 361. The court held that § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), was the appropriate statute of limitations and that appellant's action was time barred. The dismissal of appellant's action was affirmed. *Barnett, supra*, 738 F. 2d at 361.

The court in *Barnett* stated that it was not necessary to reach the merits of appellant's claims against the union and the employer. *Barnett, supra*, 738 F. 2d at 362, n. 2. By way of dictum, however, the court noted that pursuant to this Court's holding in *Hines, supra*, appellant was "potentially able" to challenge the arbitration decision if he could show a union breach of duty of fair representation which seriously undermined the arbitral process. *Barnett, supra*, 738 F. 2d at 362. The court did not hold or opine that a showing of a breach of the duty of fair representation by the union would suffice to set aside the arbitration award absent a finding that the union's breach of duty tainted the arbitrator's

decision. The *Barnett* court simply observed that a showing of a breach of duty of fair representation is a jurisdictional prerequisite to entertaining an action to set aside an arbitration award. *Barnett, supra*, 738 F. 2d 362, n. 2.

The decision of the Sixth Circuit is entirely consistent with the dictum statement of the court in *Barnett*. The Sixth Circuit held that before a court can review the merits of an arbitration decision and set aside an arbitration award there must be a showing that the union breached its duty of fair representation in the arbitral process. Appendix, pp. 13a-14a. Unlike *Barnett*, however, the Sixth Circuit did reach the merits of the action to set aside the arbitrator's award and held that it could not be set aside because there was no evidence that the Union's breach of duty tainted the arbitrator's decision.

Petitioners' claim that the Sixth Circuit's decision is antithetical to the decision of the First Circuit Court of Appeals in *Sear v. Cadillac Automobile Company of Boston*, 654 F. 2d 4 (1st Cir. 1981) is apocryphal. In *Sear*, the appellants were assessed fines in an arbitration proceeding because of their engaging in an illegal strike. They brought an action against the union and the employer claiming the union breached its duty of fair representation by failing to appeal the arbitration award. The district court disposed of the case by summary judgment, holding that the union did not breach its duty of fair representation and that without such a breach by the union the employees could not mount a collateral attack on the arbitration award.

The only question considered on appeal in *Sear* was whether the union's failure to appeal from the arbitration award breached its duty of fair representation. The court held that it did not and affirmed the dismissal of the action. *Sear, supra*, 654 F. 2d at 5. It stated that under *Hines, supra*, there must be a threshold showing of a breach of duty of fair representation by the union in the arbitral process in order to avoid the finality rule attaching to a labor arbitration award. *Sear, supra*, 654 F. 2d at 7. Since the appellants failed to meet this threshold burden, the *Sear* court did

not reach the question of whether the arbitration award could be set aside. The court, however, plainly intimated that the arbitration award could not be set aside in any event because "[T]he award itself was not *obviously* invalid" since it "drew [its] essence from the contract." *Sear, supra*, 654 F. 2d at 7.

The First Circuit's interpretation of the holding in *Hines, supra*, is in complete accord with the decision of the Sixth Circuit. Both courts agree that in order to vacate a labor arbitration award the complaining employee must show both that the union breached its duty of fair representation in the arbitral process and that such breach of duty tainted the arbitrator's decision.

In *Early v. Eastern Transfer, Inc.*, 699 F. 2d 552 (1st Cir. 1983), as in *Sear, supra*, 654 F. 2d 4, the court did not even reach the issue of whether the arbitration award could be set aside. Thus, contrary to Petitioners' argument, there is clearly no conflict between the decision in that case and the Sixth Circuit's decision in the instant case. In *Early*, the appellants brought an action against their union and their former employer seeking to set aside an arbitration award upholding their discharge. The district court granted summary judgment dismissing the action on the grounds that there was no triable issue of fact relative to the claim that the union breached its duty of fair representation in the arbitration process. The First Circuit affirmed the dismissal.

The court in *Early* stated that a showing of a union's breach of duty of fair representation in the arbitration process is only a "prerequisite" to judicial review of an arbitration award. *Early, supra*, 699 F. 2d at 555, n. 3. The court stated that —

> To have a right to contest the merits of their discharge in court, the Earlys must first show that the union violated its duty of fair representation; otherwise the decision of the joint committee is "final and binding". *Early, supra*, 699 F.2d at 555 (Citation omitted).

The decision of the Sixth Circuit in this case is consonant with the decision in *Early*, i.e., a showing of a breach of duty of fair representation by the Union is only a prerequisite to judicial examination of a labor arbitration award. Appendix, p. 13a. The *Early* court, however, did not address or rule on the question of whether the arbitration award could be set aside.

Petitioners' contention that the decision in *Del Casal v. Eastern Airlines, Inc.*, 634 F. 2d 295 (5th Cir. 1981), *cert. denied*, 454 U.S. 892 (1981) is oppugnant to the Sixth Circuit's holding in the instant case is plainly without merit. In *Del Casal*, the court held that the union's discriminatory refusal to provide the appellant with representation before an arbitration board, which upheld appellant's discharge, constituted a breach of the union's duty of fair representation. *Del Casal, supra*, 634 F. 2d at 301. Notwithstanding the finding that the union breached its duty of fair representation in the arbitration process, however, the court affirmed the district court's finding that the arbitration award could not be set aside because the union's breach of the duty of fair representation had no prejudicial effect on the arbitration decision. *Del Casal, supra*, 634 F. 2d 300, 301.

The decision in *Del Casal* is on all fours with the Sixth Circuit decision. Both courts held that a labor arbitration award cannot be set aside and an employee may not maintain a breach of collective bargaining agreement action against the employer when there is no showing that the union's breach of duty of fair representation tainted the arbitrator's decision.

The decision of the Seventh Circuit in *Miller v. Gateway Transportation*, 616 F. 2d 272 (7th Cir. 1980) is likewise in complete harmony with the decision of the Sixth Circuit, contrary to Petitioners' misrepresentation. In *Miller*, the appellant brought an action against his former employer and the union claiming that an arbitration panel wrongfully sustained his discharge and that the union breached its duty of fair representation. The court agreed with the employer's contention that the arbitration decision could be set aside only if the appellant could "show both that

the underlying grievance was meritorious [i.e., that the arbitration decision was erroneous] and that the union breached its duty of fair representation." *Miller, supra*, 616 F. 2d at 275-276. The court found that the record showed triable genuine factual issues going to the merits of appellant's claims. Accordingly, the court reversed the district court's grant of summary judgment and remanded the case for trial. *Miller, supra*, 616 F. 2d at 277.

In the instant case, the Sixth Circuit held that Petitioners' could maintain an action to set aside the arbitration award only if they could show both that the Union breached its duty of fair representation in the arbitral process and that the Union's breach of duty tainted the arbitrator's decision. The *Miller* decision is in complete accord with such holding.

The claim of Petitioners that the Sixth Circuit's decision is in conflict with the Seventh Circuit's reading of *Hines, supra*, is further negated by the following statement in *Huffman v. Westinghouse Electric Corporation*, 752 F. 2d 1221, 1225-1226 (7th Cir. 1985):

> [T]he Supreme Court has given further indications that employees seeking to litigate the merits of grievances that have been processed to final decision must show that the decision is tainted by the bad faith of the union that processed the grievance.

Petitioners' claim that the Eighth Circuit Court of Appeals decision in *Tatum v. Frisco Transportation Company*, 626 F. 2d 55 (8th Cir. 1980) is contrary to the decision of the Sixth Circuit demonstrates a misreading of the Eighth Circuit's actual holding. In *Tatum*, as in this case, the court held that if the union breaches its duty of fair representation in the arbitration process, the arbitrator's decision is reviewable on the merits. *Tatum, supra*, 626 F. 2d at 59. The *Tatum* court reviewed the arbitration decision on the merits and held that the union's breach of duty of fair representation clearly tainted the arbitration decision. *Tatum, supra*, 626 F. 2d at 59. The Sixth Circuit reviewed the arbitrator's

decision in the instant case and found that there is no evidence that the union's breach of duty tainted the arbitrator's decision.

In *Tatum*, an employee claimed that his former employer discharged him in breach of the collective bargaining agreement, contrary to the decision of an arbitration panel, and that the union breached its duty of fair representation in representing him before the arbitration panel. The court found that in the arbitration hearing the union did not call any witnesses, did not present any affidavits, nor did it inform the employee of the time of the hearings. Moreover, the union "also ignored many obvious sources of proof which could have shown that Tatum was discharged ... in violation of ... the collective bargaining agreement." *Tatum*, 626 F. 2d at 59. In short, the union's failure to present obvious evidence to the arbitration panel showing that the employee was in fact wrongfully discharged clearly tainted the arbitration decision and contributed to an erroneous outcome of the arbitration proceeding.

The Sixth Circuit in this case and the Eighth Circuit in *Tatum* applied the same standard for judicial review of an arbitration award. They reached different conclusions, however, because the evidence of record mandated different conclusions.

The Standards For Setting Aside A Labor Arbitration Arbitration Award In A Hybrid § 301[6] Action Are Clearly Explicated By The Decisions Of This Court

Petitioners argue that the decisions of this Court laying out the standards for setting aside a labor arbitration award in a hybrid § 301 action are "confusing". Such argument is inane and stems from the same fault demonstrated by Petitioners' bogus claim that the decision of the Sixth Circuit is in conflict with the decisions of other Courts of Appeals. Petitioners simply pay no

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[6]29 U.S.C. § 185.

attention to the issues actually presented to and decided by the courts.

In *Hines v. Anchor Motor Freight, Inc., supra*, this Court held that, notwithstanding an arbitration award in favor of the employer, a suit against the employer asserting breach of a collective bargaining agreement was improperly dismissed where an action against the union for breach of duty of fair representation had withstood a motion for summary judgment and remained to be tried. *Hines, supra*, 424 U.S. at 556, 572. The court of appeals had affirmed a grant of summary judgment in favor of the employer on the grounds that the arbitral finality provision of the collective bargaining had to be observed. *Hines v. Anchor Motor Freight, Inc.*, 506 F. 2d 1153, 1157 (6th Cir. 1974). This Court held, however, that when the union breaches its duty of fair representation in the arbitral process that breach removes the bar of arbitral finality and subjects the arbitration award to judicial review. *Hines, supra*, 424 U.S. at 567.

The fundamental error in Petitioners' argument is that they mistakenly equate removing the bar of arbitral finality with vacating a labor arbitration award without regard to whether the arbitration decision is erroneous. As stated in *United Parcel Service v. Mitchell, supra*, 451 U.S. at 61, this Court in *Hines* rejected the suggestion " '*that erroneous arbitration decisions*[7] must stand' in the face of the union's breach of its duty" of fair representation. Neither *Hines* nor any other decision holds or suggests that removing the bar of arbitral finality ipso facto serves to vacate a labor arbitration award whether or not the award is tainted by the union's breach of duty of fair representation.

Removing the bar of arbitral finality merely permits the court to review the merits of the arbitration award. The court must then determine whether, contrary to the arbitrator's decision, the employer breached the collective bargaining agreement and whether there is substantial reason to believe that a union

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[7]Emphasis added.

breach of duty contributed to the erroneous outcome of the arbitration proceedings. *Hines*, *supra*, 424 U.S. at 568. In the context of the facts in *Hines*, the Court thus held that —

> Petitioners, if they prove an *erroneous* discharge *and* the Union's breach of duty *tainting the decision* of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union. *Hines*, *supra*, 424 U.S. 572 (Emphasis added).

The above-quoted holding lays down the standards for vacating a labor arbitration award in a hybrid § 301 action in plain and simple terms. Upon judicial review of a labor arbitration award, if the court finds that the arbitrator's decision is *erroneous* and that the union's breach of duty of fair representation tainted the decision, then the erroneous arbitration decision cannot stand and a remedy may be had against both the employer and the union.

Contrary to Petitioners' convoluted and spurious argument, there is no inconsistency among this Court's decisions in *Hines*, *supra*, *Mitchell*, *supra*, and *Del Costello*, *supra*. As hereinbefore noted, in *Mitchell*, the court stated that *Hines* held that the usual rule of arbitral finality should not be applied to shield "erroneous arbitration decisions." *Mitchell*, *supra*, 451 U.S. at 61. And in *Del Costello*, *supra*, 462 U.S. at 165, this Court stated that to prevail against either the company or the union in a hybrid § 301 action, the employee-plaintiff must not only show that the union breached its duty of fair representation but also that the company breached the collective bargaining agreement, i.e., that the arbitrator's decision was erroneous. The opinions of this Court, insofar they bear on the issues in this case, are consistent and of single import.

Petitioners' argument that a labor arbitration award, whether or not erroneous, should be vacated based solely on a union's breach of duty of fair representation is nonsensical. Neither federal labor law policy nor just plain common sense dictate or suggest that a labor arbitration award should be set aside if it is not erroneous. Such suggestion is not only absurd but also would

make a shambles of the arbitration model judicially recognized as national labor policy.

II

On The Record In This Case The Sixth Circuit Properly Held That The Union's Breach Of Duty Of Fair Representation Did Not Taint The Decision Of The Arbitrator

The Sixth Circuit found that there is "no evidence" in the record in this case that the Union's breach of duty of fair representation tainted the arbitrator's decision.[8] Appendix, p. 14a. It also found that Petitioners' position was fully presented to the arbitrator by their own attorneys, who were permitted to examine witnesses, offer evidence and participate fully in the hearing before the arbitrator. Appendix, p. 14a.[9] Given that the record reveals no evidence that the Union's breach of duty tainted the outcome of the arbitration proceeding coupled with the undisputed finding that Petitioners' attorneys fully presented their position to the arbitrator, as a matter of simple logic it follows that "[a]ny breach of the Union of its duty of fair representation therefore could not have tainted the decision of the arbitrator." Appendix, p. 14a-16a.

Contrary to Petitioners' assertion, the Sixth Circuit did not hold as a matter of law that a union's breach of the duty of fair representation is rendered harmless in any instance where the plaintiff-employee is represented by his own counsel in an arbitration hearing. The Sixth Circuit's holding is clearly based on and limited to the record in this case.

Petitioners' contention that the Sixth Circuit's holding is in conflict with three other circuits is without merit. As appears to

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[8]Petitioners make no attempt to contest this finding in their Petition For Certiorari.

[9]Petitioners do not contest this finding in their Petition For Certiorari.

be Petitioners' bent, this contention is fabricated by lifting statements out of context from court decisions and weaving them into a self-serving argument.

Petitioners assert that in *Edwards v. Capital Airlines*, 176 F. 2d 755 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 885, "the Court agreed with plaintiffs that a grievance board decision was not binding on them, even though they had been represented by their own attorneys". (Petition For Certiorari, p. 18). The D.C. Circuit did not hold that the grievance board decision therein involved was not binding on the plaintiffs. The court held only that under the circumstances therein involved the grievance board decision was not "immune from judicial examination" and remanded the case to the district court with instructions to review the award. *Edwards supra*, 176 F. 2d at 762.

The plaintiffs in *Edwards* were non-union employees whose seniority placement by the company was contested by union members. The company had no actual concern in the controversy. The dispute was submitted to a grievance board composed of two representatives of the company and two representatives of the union of the employees. The union assumed the representation of its members and was actively an adversary party vis-a-vis the plaintiffs. The court held that "under this combination of circumstances" the final and binding clause of the contract could not prevent the non-union plaintiffs from securing a judicial review of the adverse arbitration award. *Edwards, supra*, 176 F. 2d at 761.

There is no similarity between the issues presented and decided in *Edwards* and in the instant case. Therefore, there is no conflict between the decision in *Edwards* and the decision of the Sixth Circuit in this case.

The claim of Petitioners that the Sixth Circuit's decision is in conflict with the "decision" in *Hiller v. Liquor Salesmen's Union Local No. 2*, 338 F. 2d 778 (2nd Cir. 1964) demonstrates a lack of attention to the facts and holding in *Hiller*. *Hiller*, unlike the instant case, was not a hybrid § 301 action and no arbitration award was involved. In *Hiller*, the administrators of a decedent

employee's estate brought an action for damages against the union and the company based on a claim of a conspiracy between the union and the company to defraud the decedent employee. *Hiller, supra*, 338 F. 2d at 779. The district court stayed the action pending arbitration. The Second Circuit reversed, holding that "where the employee's case is based upon a conspiracy between his union and his employer to deprive him of his rights he cannot be forced to submit that issue to an arbitration between the employer and the union." *Hiller, supra*, 338 F. 2d at 779.

By way of dictum, the *Hiller* court stated that the district court's order for the plaintiffs to have separate representation at an arbitration would not "cure the defects" inherent in that arrangement since the plaintiffs would be aligned on one side of their adversary, the union. *Hiller, supra*, 338 F. 2d at 779. Neither the "decision" nor the dictum statement alluded to by Petitioners is in conflict with the Sixth Circuit's decision in this case.

Contrary to Petitioners' contention, there is patently no conflict between the decision of the Sixth Circuit and the decision in *Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO v. Michelson's Food Service, Inc.*, 545 F. 2d 1248 (9th Cir. 1976). In *Michelson's*, an employee claimed that his employer underpaid him in violation of a collective bargaining agreement. The employee contended that he should not be required to arbitrate his claim because the union would not properly represent him.

The Ninth Circuit rejected the employee's contention and held that he must submit his claim to arbitration. The court stated that the employee could "participate fully, in person and by counsel, and protect his own interests". *Michelson's, supra*, 545 F. 2d at 1252. The court further stated that although the arbitration award would be prima facie binding, the employee could come into court and attack the award on the grounds that it was "the result of the union's bad faith, fraud or collusion". *Michelson's, supra*, 545 F. 2d at 1252. But the court noted, "[i]f he losses on

that issue, that will terminate his case." *Michelson's, supra*, 545 F. 2d at 1252.

In short, the *Michelson's* court held that whether or not the employee was represented by his own counsel in the arbitration proceeding he could attack the arbitration award on the grounds that the union's breach of duty tainted the result of the arbitration proceeding. The court held, however, that if he could not show that the union's breach of duty tainted the arbitration decision, his case would terminate and the court could not consider the merits of his claim. *Michelson's, supra*, 545 F.2d at 1252.

The Sixth Circuit did not hold that Petitioners could not attack the labor arbitration award in the instant case because they were represented by their own counsel in the arbitration proceeding. The court held that because the Petitioners' position was fully presented by their own counsel and there was no evidence in the record to show that the arbitration award was tainted by any union breach of the duty of fair representation, their attack on the arbitrator's award was without merit. And since their attack on the arbitrator's award was without merit, the court could not set aside the arbitrator's award and entertain their claim that Kroger breached the collective bargaining agreement. The Sixth Circuit's decision is in complete accord with the decision in *Michelson's*.

Petitioners have not presented any legitimate basis for review of the Sixth Circuit's decision in this case.

III

The Sixth Circuit Court Of Appeals Did Not Reach The Question Of Whether Petitioners Were Entitled To A Jury Trial And There Is No Reason For This Court To Review That Question

Petitioners assert that "all the issues in this case were submitted to a jury" (Petition For Certiorari, p. 21). This statement is incorrect. The critical issues attendant to Petitioners' actions for a remedy against Kroger and the Union are: 1)

whether the arbitrator's decision is erroneous and 2) whether the Union's breach of duty of fair representation tainted the arbitrator's decision. *Hines v. Anchor Motor Freight, Inc.*, *supra*, 454 U.S. at 572. Neither of these issues was submitted to a jury.

The Sixth Circuit did not rule on the question of whether Petitioners were entitled to a jury trial on the merits of their claims against Kroger and the Union. Petitioners could not maintain an action on the merits of their claim against Kroger for alleged breach of the collective bargaining agreement unless they proved that the arbitrator's award was erroneous and that the Union's breach of the duty of fair representation tainted the arbitrator's decision. *Hines*, *supra*, 424 U.S. at 572. Since the evidence of record showed that Petitioners failed to carry this burden of proof, there was and is no purpose to be served by deciding whether they are entitled to a jury trial on the merits of their actions.

This Court does not ordinarily consider questions not passed on by the court below. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984).[10] That policy is aptly suited to the instant case. Whether Petitioners were entitled to a jury trial on the merits of their action against Kroger is academic because there is no basis on which the court could set aside the arbitrator's award[11] and thus Petitioners could not prevail against either Kroger or the Union in any event. *Hines*, *supra*, 424 U.S. at 572.[12]

Inasmuch as the Sixth Circuit did not rule on the issue of whether Petitioners were entitled to a jury trial, Petitioners' contention that "[T]he Sixth Circuit's decision in this case

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[10]Also, this Court has stated that it reviews judgments, not statements in opinions. *Black v. Cutter Laboratories*, 353 U.S. 292, 297 (1956).

[11]Whether the arbitrator's award could be set aside is a question of law for the court's determination.

[12]As Judge Contie stated in his concurring opinion, "only if *the court* concluded th. . . the arbitration award had to be set aside, which we hold today it could not have been, should it have tried the breach of contract claim to a jury." Appendix, p. 22a. Emphasis added.

conflicts directly with decisions in three other Circuits" (Petition For Certiorari, p.21) is patently absurd. Moreover, the cases alluded to by Petitioners as being in conflict with the Sixth Circuit's "non decision" in this case are inapposite to the instant case.

In *Cox v. C.H. Masland & Sons, Inc.*, 607 F. 2d 138 (5th Cir. 1979) there was no arbitration award involved. The plaintiff brought an action against his union and the employer because the union had refused to take to arbitration his case against the employer for breach of the collective bargaining agreement.

Roscello v. Southwest Airlines Co., 726 F. 2d 217 (5th Cir. 1984) was not a hybrid § 301 action, as is the instant case. There was no claim of breach of a collective bargaining agreement and no arbitration award involved. The plaintiff's action against the employer was predicated on his claim that the employer discharged him for engaging in union activity in violation of the Railway Labor Act, 45 U.S.C. § 151. *Roscello, supra*, 726 F. 2d at 219, 220.

Quinn v. Digiulian, 739 F. 2d 637 (D.C. Cir. 1984) is also not a hybrid § 301 action. In that case, the plaintiff brought an action against the union and two of its officers for allegedly harassing him because he decided to run as a candidate for union office against an incumbent. No employer was involved in *Quinn*, there was no claim of breach of a collective bargaining agreement and no arbitration award was involved.

Minnis v. International Union U.A.W., 531 F. 2d 850 (8th Cir. 1975) is not a hybrid § 301 action. The district court had ruled in favor of the employer, and the plaintiff pursued his action against the union for breach of duty of fair representation in failing to adequately present a grievance to the employer.

None of the above cases cited by Petitioners address or decide the issue pertinent to the instant case, i.e., whether a plaintiff-employee is entitled to a jury trial on a claim against his employer for breach of a collective bargaining agreement when an

arbitration award stands between the employee and any judicial remedy against the employer and there is no grounds for vacating the arbitration award.

Whether or not Petitioners were entitled to a jury trial on the merits of their claims in this case, the judgment of the Sixth Circuit must stand. There is therefore no reason to address the question posed by Petitioners.

CONCLUSION

In this case, an arbitration award stands between Petitioners and any relief which may be awarded against Kroger. Petitioners were required to prove that the arbitrator's award was erroneous and that the Union's breach of duty of fair representation tainted the arbitrator's decision before they were entitled to reach the merits of their breach of collective bargaining agreement claim against Kroger. Petitioners simply failed to carry their burden of proof and, as correctly held by the Sixth Circuit, were not entitled to prevail against either Kroger or the Union.

There is here presented no conflict with an analogous decision of any other Circuit Court of Appeals, no important question of federal law which should be settled by this Court and no conflict with applicable decisions of this Court. The Petition For Certiorari should be denied.

Respectfully submitted,

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Dated: May 29, 1987

No. 87-1759

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

KENNETH WOOD, et al.,
Petitioners

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, ET AL,
Respondents

APPENDIX

Court of Appeals Opinion

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 85-1880/1963/1964

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENNETH WOOD, JEFFERY FANSLER, CHARLES BOHNER, et al.,
Plaintiffs-Appellants, (85-1880)
Respondents-Appellees,
(85-1963/64),

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, et al.,
HAMADY BROS., FOOD MARKETS, INC.,
Defendants-Appellees, (85-1880)

KROGER COMPANY,
Petitioner-Appellant, (85-1963),

GENERAL TEAMSTERS UNION LOCAL 406,
Petitioner-Appellant, (85-1964).

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed December 15, 1986

Before: KEITH and KENNEDY, Circuit Judges; and CONTIE, Senior Circuit Judge.

KENNEDY, Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. CONTIE, Senior Circuit Judge, (pp. 20-22) delivered a separate concurring opinion.

KENNEDY, Circuit Judge. Petitioners-appellants Kroger Company ("Kroger") and General Teamsters Union Local 406 ("the Union") appeal from a jury verdict and various interlocutory orders entered by the District Court for the Western District of Michigan in an action brought by respondents-appellees, former employees of Kroger, ("plaintiffs") under Section 301(a) of the Labor Management Relations Act. Plaintiffs appeal from the District Court decision granting the motion of defendant-appellee Hamady Brothers Food Markets ("Hamady") to dismiss. The plaintiffs' action before the District Court was based on three claims: 1) breach of the duty of fair representation by the Union;-2) breach of the collective bargaining agreement ("the contract") by Kroger; and 3) successor liability of Hamady. For the reasons stated below, we affirm the District Court's dismissal of Hamady and reverse the Court's denial of Kroger's and the Union's motions for judgment notwithstanding the verdict.

I. FACTS AND PROCEEDINGS BELOW

Plaintiffs' action arose out of Kroger's lease/sale of one of its warehouses to Hamady. Plaintiffs, 38 former Kroger warehouse employees, only one of whom was hired by Hamady, were represented by the Union at the time of the transfer.[1] The terms and conditions of their employment were controlled by a collective bargaining agreement between Kroger

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[1]The one employee hired by Hamady alleged a loss of wages and benefits.

and the Union. Section 1.3 of the contract provided that "[t]his Agreement shall be binding not only upon the parties hereto but upon their successors and assigns." Collective Bargaining Agreement, Joint Appendix at 557. The agreement also established a grievance procedure, which was the exclusive mechanism for resolving disputes over the interpretation or application of the contract. The final, and binding, step of the procedure was arbitration. *Id.* at 564.

Kroger is an Ohio corporation, with operations in twenty-four states. In the spring of 1980, Kroger decided to sell its Michigan stores because they were not profitable. Arrangements were made to sell the stores to Hamady. On August 6, 1980, Hamady and Kroger entered into a separate agreement regarding the warehouse. The agreement provided that Kroger would lease the warehouse to Hamady for seven years, at the end of which time Hamady would purchase the warehouse. Kroger would also lease the equipment in the warehouse to Hamady for thirty-six months, with the provision that Hamady would purchase the equipment at the end of that period. Finally, Kroger and Hamady entered into a service agreement under which Hamady would provide Kroger stores with groceries and produce until October 4, 1980, with renewal options which could extend until January 3, 1981.

During the negotiations between Hamady and Kroger, Kroger representatives notified Hamady representatives of the collective bargaining agreement, and particularly of the successors and assigns clause. Mr. Hirsch, a Kroger representative, informed the Hamady representatives that the warehouse employees were a good group of people and that the dealings with the Union had been good. Joint Appendix at 824-25. A Union official testified that, in turn, Mr. Hirsch told the Union official that he did not think there would be a problem in terms of Hamady's assumption of the contract. In a letter dated September 23, 1980, a Union official informed Kroger that if Hamady did not assume the contract, the Union would hold Kroger responsible for any damages to the employees.

At the time of the announcement of the lease/sale to Hamady, the Union met with Hamady officials to determine the effect of the transfer on the employees. There was some discussion of the seniority rights of the employees. In a meeting on September 15, 1980, Mr. Griffin, a Hamady official, stated in response to Union inquiries that Hamady intended to do its hiring exclusively from the Kroger employee roster. Hamady officials understood that Kroger was happy with its workforce at the warehouse. Mr. Griffin also told the Union that Hamady would make an effort to take seniority into consideration. At the same meeting, the Hamady officials informed the Union representatives that they would not accept the collective bargaining agreement. *Id.* at 379-80. In a letter dated September 22, 1980, the attorney for the Union acknowledged to the Union that Hamady was probably not bound by the Kroger contract. Joint Appendix at 861-62.

The sale of the warehouse was announced to the employees in a meeting held on August 7, 1980. On September 27, 1980, a second meeting was held in order to answer questions regarding the employees' contract. At this meeting, Mr. Griffin, the Hamady official, informed the employees that Hamady would not adopt the contract and would not necessarily hire in order of seniority. Thereafter, the warehouse employees were interviewed and given physical examinations. Hamady posted the list of employees who would be hired. Hamady hired approximately half of the employees of the warehouse, but did not do so in order of seniority. On October 20, 1980, Kroger ceased operations at the warehouse and transferred the assets to Hamady.[2]

Hamady did recognize the Union as the exclusive bargaining agent for its new employees. After the meeting on September 27, Hamady officials engaged in bargaining with the Union. A new agreement governing the warehouse employees

[2]Due to unfavorable economic conditions, Hamady ceased operations one year later in October of 1981.

was reached on November 10 and ratified on November 22. The new collective bargaining agreement included many of the same provisions as the previous contract.

In early October, a former employee filed a grievance with the Union, claiming that Kroger and/or Hamady had violated the collective bargaining agreement. On that same day, the Union filed a grievance asserting that the agreement should be binding on Hamady and that Kroger had the obligation to see that Hamady assumed the contract. These grievances were denied at the Step 1 and Step 2 grievances. In addition to their request that the Union file a grievance, the employees requested that the Union seek an injunction against the transfer of the warehouse. Judge Hoffius of the Kent County, Michigan, Circuit Court initially entered a temporary restraining order, but the order was later dissolved.

The employees filed suit in the Kent County Circuit Court on October 16, 1980, claiming that: 1) the Union had breached its duty of fair representation, 2) Kroger had breached the collective bargaining agreement by failing to bind Hamady to the collective bargaining agreement, 3) Hamady was liable as a successor to Kroger, and 4) Hamady had discriminated against the employees on several different bases. The discrimination claims were severed and are not at issue here. Kroger and the Union removed the case to the District Court. When the representatives hearing the Step 3 grievance deadlocked, Kroger demanded a rehearing on this step of the grievance procedure. The Union, however, refused to participate because it contended that such a rehearing was not authorized. In February, 1981, the Union filed a motion to compel Kroger to arbitrate the grievances. The District Court ordered Kroger and Hamady to arbitrate the issues. It also ordered that the interested employees be allowed to provide a spokesperson of their own to participate in the arbitration proceedings. The Court retained jurisdiction of the case pending completion of the arbitration process.

The arbitration hearing lasted four days. Plaintiffs were represented by their own attorneys, who participated fully in the hearing. Thus, they presented witnesses and evidence, cross-examined the witnesses of the other parties, and submitted briefs. The arbitrator chosen by the parties was Robert Howlett, an experienced and respected arbitrator. On January 8, 1982, he issued an opinion finding that Hamady was not a "successor" to Kroger and thus was not obligated to arbitrate, and that Kroger was not obligated to require Hamady to assume the contract. The arbitration award was binding, in accordance with the collective bargaining agreement.

After the arbitration award was issued, plaintiffs filed a motion for trial in the District Court. Kroger moved to strike plaintiffs' jury demand on the ground that a jury trial is not available in a hybrid section 301 action. The District Court denied this motion. In response to other motions, the Court also refused to certify the action as a class action and refused to permit the arbitrator to testify at the trial. It also rejected Kroger's motion for summary judgment.

The liability issues were bifurcated and tried first. During the trial, the plaintiffs offered evidence presented by Professor Summers, a labor law professor with experience arbitrating. This testimony was admitted over the objections of both Kroger and the Union. The witness presented evidence that an arbitrator may be influenced by signals given out by a union indicating that the union does not want to win the case. Joint Appendix at 355-63. The District Court refused to admit into evidence the arbitrator's decision and award although it did permit testimony relating to them.

Hamady moved for dismissal after the plaintiffs had presented all of their proof. Its motion was granted. The District Court found that Hamady was not a "successor" to Kroger, and was not obligated to assume the collective bargaining agreement. District Court Opinion, Joint Appendix at 197. Plaintiffs appeal from this dismissal. The District Court

denied Kroger's motion to dismiss on the ground that the expert witness presented evidence that the Union's conduct may have affected the arbitrator's decision, thus making it vulnerable.

The District Court submitted the following special interrogatories to the jury:

> 1. A. Did the Union violate its duty of fair representation by its conduct apart from the arbitration hearing with respect to the claims against Hamady?
>
> B. Did the Union violate its duty of fair representation by its conduct apart from the arbitration hearing with respect to the claims against Kroger?
>
> 2. A. Did the Union violate its duty of fair representation by its conduct during and related to the arbitration hearing with respect to the claims against Hamady?
>
> B. Did the Union violate its duty of fair representation by its conduct during and related to the arbitration hearing with respect to the claims against Kroger?
>
> 3. A. If your answer to Question 2A was "yes," did such violation seriously undermine the integrity of the arbitration process as that process related to the claims against Hamady?
>
> B. If your answer to Question 2B was "yes," did such violation seriously undermine the integrity of the arbitration process as that process related to the claims against Kroger?
>
> 4. Did Kroger violate the successors and assigns clause by transferring the warehouse to Hamady without requiring Hamady to assume the collective bargaining agreement as a condition of the sale?

Joint Appendix at 215-16. The District Court instructed the jury that if it found that the Union had breached its duty

and that that breach had undermined the arbitration process, it should determine whether Kroger breached the collective bargaining agreement. The jury found both that the Union had breached its duty and that that breach had undermined the arbitration process. It then found that the collective bargaining agreement obligated Kroger to require Hamady to assume the agreement.

Kroger and the Union both moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. The District Court denied these motions. District Court Opinion, Joint Appendix at 218. It stated that there was sufficient evidence to show that the Union had breached its duty, both apart from and during the arbitration hearing, and that this breach had undermined the entire arbitration process. Furthermore, the Court found that the jury's interpretation of the term "successor" was supported by the evidence. On the petition of Kroger and the Union, the District Court certified the following five questions pursuant to 28 U.S.C. § 1292(b):

> 1. Whether the Court properly ruled that plaintiff had a right to a jury trial in this case;
>
> 2. Whether, given the Court's determination that Hamady was not a successor under federal labor law, the jury could properly find a breach by the union of its duty of fair representation with respect to Hamady;
>
> 3. Whether there can be any recovery for Union conduct apart from the arbitration hearing regarding claims against Kroger or against Hamady;
>
> 4. Whether the jury was properly instructed regarding the standard that must be met by plaintiffs before the jury could find that the arbitrator's decision should be set aside; and
>
> 5. Whether the Court properly instructed the jury regarding the jury's interpretation of the Kroger-Local 406 contract.

Joint Appendix at 258.

This Court granted permission to appeal. These claims of Kroger and the Union, as well as plaintiffs' appeal from the dismissal of Hamady, are now before us.

II. HAMADY'S DISMISSAL

At the close of plaintiffs' case, the District Court granted Hamady's motion for dismissal, finding that plaintiffs had not "made out a case against Hamady." District Court Opinion at 4, Joint Appendix at 200. The Court found no evidence to indicate that Hamady was an alter ego, that Hamady had assumed the collective bargaining agreement, or that there was common ownership or control of the two companies. The Court found, "[e]ven using the stricter standard of scrutiny required when considering a motion for a directed verdict," that Hamady was not bound by the collective bargaining agreement. *Id.* We affirm the judgment of the District Court.

The Court addressed in turn each of the three exceptions to the general rule that a new employer cannot be held to the terms of a former employer's collective bargaining agreement. First, the Court found that Hamady was not an "alter ego" of Kroger. The United States Supreme Court has stated that a new employer may be bound by the terms of the former employer's contract if the new employer is found to be "merely a disguised continuance of the old employer." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974) (citing *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). An "alter ego" will be found only in cases "involv[ing] a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws." 417 U.S. at 259 n.5. The District Court correctly found that this case is not such a case and that the two corporations are "distinct corporate entities." District Court Opinion at 10, Joint Appendix at 206.

The District Court next considered whether Hamady had expressly or impliedly assumed the contract. The Court found that Hamady's answers to the employees' questions regarding its assumption of the contract were equivocal at best. In addition, "even if silence *could* be construed as acceptance in this context, Hamady was not silent for long." District Court Opinion at 12, Joint Appendix at 208. In fact, plaintiff Wood admitted in the verified complaint he filed with the Circuit Court for Kent County that Hamady had announced it would not adopt the contract: "Notwithstanding the successors and assigns clause of the labor Contract ..., Hamady has stated that it will not adopt the Contract." Joint Appendix at 35. The District Court found that plaintiffs did not present any evidence to indicate assumption of the contract, and that in fact, Hamady had expressly renounced the agreement.

The third circumstance in which a new employer may be held bound by its predecessor employer's contract is where there is "substantial continuity" of business operations, resulting in successor liability on the part of the new employer. Three Supreme Court cases address successorship in this context. *See Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974); *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972); *John Wiley and Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). These cases must be read together to understand the distinguishing criteria in this area. The District Court found that, under these three cases, Hamady was not liable as a successor.

In *Wiley*, a union brought an action to compel arbitration under a collective bargaining agreement adopted by the predecessor company. The new company had acquired the original company by merger. On these facts, the Supreme Court held that "the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement." *Wiley*,

376 U.S. at 548. The Court limited this holding when it stated: "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives." *Id.* at 551. Where there is a lack of "substantial continuity of identity in the business enterprise," the Court acknowledged that the duty to arbitrate may not survive. *Id.*

In *Burns* a corporation that had been providing security services was replaced by a corporation that had submitted a lower bid. The new employer hired twenty-seven of the original forty-two guards and brought in fifteen of its own. The case arose in the context of an unfair labor practice charge as opposed to an action to compel arbitration. The Court held that the successor employer had a duty to recognize and bargain with the union representing the original employees, but did not have an obligation to adopt the contract provisions. The Court stated that, where the majority of employees after the change had been previously employed by the predecessor employer, the new employer must bargain with the union. *Id.* at 281. In refusing to hold the successor employer bound by the prior agreement, the Court pointed out a significant difference between *Burns* and *Wiley*: "Its [*Wiley*'s] narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." *Id.* at 286.

Finally, in *Howard Johnson*, the Court addressed a situation in which the successor employer had not hired a majority of the original employees and the change of ownership was by means of a purchase of assets rather than a merger. The Court held that, under *Wiley*, there was no substantial continuity of identity in the business enterprise and thus no duty to arbitrate. *Howard Johnson*, 417 U.S. at 263-65. In addition to the failure of the successor to hire a majority of the original employees, the Court emphasized the differences between a merger and a purchase of assets. First it stressed that the origi-

nal employer fails to exist when two companies are merged, making it impossible for the employees to find relief if they cannot turn to the successor. Second, the Court mentioned that in the case of a merger, state law usually provides that the surviving corporation will assume the original company's obligations. *Id.* at 257-58. After *Howard Johnson,* there must be continuity in terms of both the workforce and the operations in order to find successor liability under the collective bargaining agreement.

The District Court correctly observed that the application of the "substantial continuity" test is fact specific. Joint Appendix at 209. Although Hamady did hire fifty-one percent of the former Kroger employees, the Court found, on the basis of the facts of the case now before this Court, that the distinctions between this case and *Wiley* were controlling. The Court stressed the facts that Kroger, the original employer, did not disappear; that state law provides for no assumption of obligations by a purchaser of assets; and that there were significant differences in the operations of Kroger and Hamady. Joint Appendix at 210-11. The transaction between Kroger and Hamady was an arms length transaction. Finally, the District Court added that policy considerations favored Hamady in this case. The Kroger warehouse was failing and Hamady knew substantial changes would have to be made for it to be made profitable. The Court found that if Hamady had known it would have to adopt the contract, it would not have purchased the warehouse at all. District Court Opinion at 16-17, Joint Appendix at 212-13.

We affirm the District Court's decision finding that Hamady was not bound by the collective bargaining agreement between Kroger and the Union and granting Hamady's motion to dismiss.

III. KROGER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Petitioner Kroger raises three claims on interlocutory appeal. First, it claims that the District Court erred in failing

to strike the plaintiffs' jury demand, thus allowing the jury to substitute its interpretation of the collective bargaining agreement for that of the arbitrator. Second, Kroger asserts that the arbitration award cannot be set aside unless there is a finding that the Union breached its duty of fair representation and that this breach tainted the arbitrator's decision. Third, Kroger claims that the Court erred because it failed to instruct the jury on the interpretation of the term "successor" under federal labor law. This Court finds that there was no evidence that any breach of the Union of its duty of fair representation tainted the arbitrator's decision. Thus, we do not reach Kroger's first and third claims. We reverse the District Court's denial of Kroger's motion for judgment as a matter of law and remand with direction to confirm the arbitration award.

A court may not review the merits of an arbitration decision, even when the basis for the decision is ambiguous, as long as the award draws its essence from the bargaining agreement. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-99 (1960). Even in the event of a union's breach of its duty of fair representation, an arbitration award is not quickly set aside. Kroger correctly asserts that to vacate an arbitration award on this ground, there must be two findings. First, the Union must have breached its duty of fair representation to the employee. Second, the breach of duty by the Union must have tainted the arbitrator's decision. The breach must have contributed to the arbitrator's making an erroneous decision. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

In *Hines*, the Supreme Court held that if the union's breach of its duty of fair representation seriously undermines the integrity of the arbitration process, that breach also removes the bar of finality of the arbitration decision. *Hines*, 424 U.S. at 567. The question for the Court is whether there is substantial reason to believe that a union's breach of duty contributed to the erroneous outcome of the arbitration proceeding.

The Supreme Court concluded: "Petitioners, if they prove an erroneous discharge and the Union's breach of duty tainting the decision . . . , are entitled to an appropriate remedy against the employer." *Id.* at 572.

There was conflicting evidence presented to the jury in this case with respect to the breach by the Union of its duty of fair representation in the manner of its presentation of the grievance at the arbitration hearing. However, there was no evidence from which the jury could find that there was "substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings," assuming that the outcome was erroneous. *Hines,* 424 U.S. at 568. Here, plaintiffs' position was fully presented to the arbitrator by their own attorneys. These attorneys were permitted to examine witnesses, offer evidence and participate fully in the four-day hearing before the arbitrator.

Plaintiffs cite the Union's objections to evidence and testimony presented by plaintiffs, and claim that this conduct on the part of the Union undermined the entire arbitration process. The number of objections made by a party, however, is irrelevant to the arbitrator in making his decision. Plaintiffs had ample opportunity to correct any erroneous assertions made by the Union and to compensate for its behavior. Plaintiffs' independent attorneys insured that plaintiffs' interests were fairly represented. Any breach by the Union of its duty of fair representation therefore could not have tainted the decision of the arbitrator.

Plaintiffs assert that the Union signalled to the arbitrator that it did not desire to win the case. They claim the Union accomplished this by objecting to plaintiffs' evidence and by permitting the arbitrator to see a letter from the Union attorney to the Union opining that the Union had only a fifty-fifty chance of winning the grievance. Plaintiffs had attempted to present to the arbitrator their claim that the Union had breached its duty of fair representation in not taking stronger

steps to get seniority in the contract with Hamady. In defense of that claim, the Union intended to show that it had relied on counsel's opinion that it was unlikely that Hamady was bound by the successor and assigns clause when bargaining with Hamady. The arbitrator declined to hear the unfair representation claims. An exhibit including the letter was left with the arbitrator and returned by him. The circumstances permit an inference that he may have seen the letter. Plaintiffs presented an expert witness, experienced in arbitration, who testified that signals by the Union that it didn't want to win would be likely to influence an arbitrator, although he also acknowledged that they might not and the arbitrator might indeed lean the opposite way. The essence of plaintiffs' claim is that the arbitrator did not decide the case on the basis of the evidence and law presented to him but on the basis of some signal from the Union. Plaintiffs are making an attack on the impartiality of the arbitrator. Whether the arbitrator was influenced by the Union's signals is a question relating to bias or prejudice on the part of the arbitrator. There was no claim made at trial, however, that the arbitrator was biased or influenced by the Union. Expert testimony that some arbitrators may be influenced by union signaling does not permit the speculation that this arbitrator was so influenced where plaintiffs' own attorneys fully presented their case. There was no assertion that the arbitrator was anything but respectable, and his 82-page opinion appears to be thorough and supported by the evidence.

The evidence proffered by plaintiffs to prove that the arbitration award should be set aside does not support the requisite claim that the Union's breach tainted the arbitrator's decision, but instead goes to an issue not raised, specifically the neutrality of the arbitrator. We reverse the District Court's denial of Kroger's motion for judgment as a matter of law on the ground that there was insufficient evidence to justify vacating the arbitration award. The arbitrator's decision that Kroger did not violate the contract by failing to

require Hamady to assume the contract is binding on the parties.

IV. THE UNION'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The Union argues that its conduct was not the but-for cause of any loss suffered by plaintiffs and that it therefore cannot be found liable to plaintiffs for breach of the duty of fair representation. The District Court, denying the Union's motion for judgment notwithstanding the verdict, found that there was sufficient evidence to support the findings of the jury that the Union violated its duty both apart from and during the arbitration. We hold that the Union is not liable to plaintiffs for any form of damages, including attorneys' fees, and we reverse the District Court's denial of the Union's motion for judgment as a matter of law.

Plaintiffs claim that the Union breached its duty of fair representation with respect to its representation of their claims against Hamady and Kroger both apart from and during the arbitration. Where the alleged breach relates to the arbitration, an employee will not be entitled to recover from a union if the union's breach did not lead to injury. A court will not award sanctions that are solely punitive against a union. In *Hines v. Anchor Motor Freight, Inc.*, the Supreme Court stated: "To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines*, 424 U.S. at 570-71. *See also United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62 (1981); *Clayton v. United Automobile Workers*, 451 U.S. 679, 683 n.4 (1981). This Court has similarly held that a union owed no damages to a plaintiff if the employer did not act wrongfully. *St. Clair v. Local Union No. 515, Int'l Brotherhood of Teamsters*, 422 F.2d 128, 132 (6th Cir. 1969). In the case before this Court, therefore, plaintiffs must prove both the breach of duty and the wrong of the

employer that resulted in their loss. We have dismissed plaintiffs' claims with respect to both Hamady and Kroger. Because, as found by the arbitrator, there was no breach of the collective bargaining agreement and no injury to plaintiffs, we find no liability on the part of the Union with respect to its representation of their claims during the arbitration proceeding.

With respect to conduct apart from the arbitration, the Union is liable for damages only if its breach was a "but-for" cause of those damages. "[C]ourts have held unions not liable for breaches of their duty of fair representation absent evidence that but for the union's conduct the employee would not have been injured." *Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574, 580 n.8 (8th Cir. 1981). The Court of Appeals for the Third Circuit also summarized the applicable law relating to a union's breach of duty in this situation: "[T]he federal courts have consistently required a direct nexus between breach of this duty and resultant damages to the individual or minority segment as an element of liability." *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977).

In support of their claim of breach of the duty of fair representation, plaintiffs submit numerous acts of the Union conducted apart from the arbitration and other actions it failed to take. They claim, among other things, that the Union failed to keep its members advised as to the negotiations with Hamady, failed to make reasonable efforts to require Hamady to honor the contract, negotiated a new deal with Hamady considering solely its own interests, and harassed plaintiffs. Supplemental Complaint, Joint Appendix at 80-84. In order to recover against the Union, plaintiffs must demonstrate that Hamady would have adopted the contract and that they would not have been injured had the Union not breached its duty. *See Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986) (affirming grant of summary judgment against employees because plaintiffs could not

establish that the employer would have given in to their demands).

We can only speculate whether Hamady would have hired the employees by seniority in accordance with the contract if the Union had performed all the acts and refrained from all the acts which plaintiffs claim it should have. Plaintiffs presented no evidence to establish this causal connection between the Union's alleged breach and their alleged injuries. We hold that the Union is not liable to plaintiffs with respect to its representation of their interests apart from the arbitration.

Plaintiffs finally claim that they are entitled to the expenses they incurred because the Union would not fairly represent them in the arbitration proceeding. These expenses consist of attorneys' fees due the counsel that represented the plaintiffs in the four-day hearing. Plaintiffs assert that because the Union failed to fairly represent their interests, plaintiffs hired their own outside counsel and thus were damaged to the extent of the attorneys' fees. Plaintiffs contend that the Union's breach caused damage that is independent of the claims against Kroger and Hamady and that they should be able to recover these expenses regardless of the outcome of their grievance.

Several courts have held that an employee may recover attorneys' fees even where the outcome of the arbitration favored the employer. In *Del Casal v. Eastern Airlines, Inc.*, the union's refusal to process the claims of an employee was found to be a breach of its duty. *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981). Although the claim of wrongful discharge was decided in favor of the employer, the court awarded attorneys' fees to the plaintiff. The court stated that "[h]ere, the damage caused by the union was the attorney's fee which Del Casal incurred as a result of the union's breach." *Id.* at 301. Citing *Del Casal*, the Court of Appeals for the First Circuit held that a union was liable only for the increase in damages to the

plaintiff that it brought about. It stated, however, that "[t]hese additional damages—apparently consisting of additional legal costs—were incurred ... whether or not [the plaintiff] won on the merits of his grievance." *Stanton v. Delta Airlines, Inc.*, 669 F.2d 833, 838 (1st Cir. 1982). Similarly, the Court of Appeals for the Ninth Circuit has held that an employee is entitled to attorneys' fees incurred because he is forced to represent himself. *See Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983).

Claims for attorneys' fees in cases such as this one must be examined on a case-by-case basis. We decline to follow the circuits that have granted recovery of damages in the form of attorneys' fees where the plaintiff did not prevail on the merits of the grievance. The Union is intended to serve as the exclusive agent for the member employees and employees should be discouraged from pursuing their claims independently. Moreover, it is against "sound judicial policy to encourage actions to recover only the costs of litigation where no underlying right can any longer be vindicated in the action." *Badon v. General Motors Corp.*, 679 F.2d 93, 98 (6th Cir. 1982). Granting attorneys' fees to each member employee who demonstrates a breach of the duty of fair representation but no injury will lead to frivolous actions. We hold that plaintiffs are not entitled to recover attorneys' fees from the Union.

V. CONCLUSION

We affirm the District Court's judgment granting Hamady's motion to dismiss. We reverse the Court's denial of petitioners-appellants' motions for judgment notwithstanding the verdict and we remand with direction to confirm the arbitration award.[3]

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[3]We do not reach the issue discussed by Judge Contie in his separate concurrence. However, we have no disagreement with his analysis.

CONTIE, Senior Circuit Judge. I concur in the majority's conclusion, reversing and remanding this case and agree with its analysis in reaching that conclusion. However, I would have resolved the important issue of whether the right to a jury trial exists in a hybrid action for breach of a collective bargaining agreement and breach of the duty of fair representation brought under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). In the present case, both the Union and Kroger moved to strike the plaintiffs' demand for a jury trial. The district court denied the motions and the plaintiffs' hybrid § 301 action was tried to a jury.

Generally, the right to a jury trial exists either under the Seventh Amendment or by statute. Clearly, no labor statute specifically grants the right to a jury trial in a hybrid § 301 action. Thus, the sole question is whether the right exists under the Seventh Amendment. That amendment states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." The Seventh Amendment guarantees jury trials not only in actions known at common law, but also in actions created after passage of the Seventh Amendment "if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (footnote omitted). Thus, whether a jury trial is available depends on the historical nature of the claim; a claim "legal" in nature is generally triable to a jury where an "equitable" claim is not.

In determining whether the right to a jury trial exists for a newly-created action, the focus is "on the nature of the *issue* to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (emphasis added, footnote omitted). Thus, resolution of the jury trial question turns on whether the issues involved are legal or equitable in nature. As the Supreme Court observed in *Ross*, "the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions [i.e., whether

that type of issue was customarily tried to a jury or court]; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.* at 538 n.10. This Circuit has recognized that the second of these elements is the most significant. *Hildebrand v. Board of Trustees*, 607 F.2d 705, 708 (6th Cir. 1979), *cert. denied*, 456 U.S. 910 (1982).

The individual issues presented in this case, as in any hybrid § 301 action, are whether the Union breached its duty of fair representation and whether the employer, Kroger, breached the collectively bargained labor contract. I would find that the fair representation issue is equitable in nature, and therefore not triable to a jury, because the primary relief sought for breach of the duty of fair representation is equitable. That is, in order to reach the breach of contract issue, the plaintiffs had to have the arbitration award set aside, which could only be done by proving that the Union breached its duty of fair representation and also seriously undermined the arbitration process. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). Setting aside an arbitration award is certainly an equitable remedy. Therefore, under *Ross*, the duty of fair representation claim would be considered equitable in nature.

However, considering the breach of contract issue separately from the fair representation issue, I would find that it is legal in nature and triable to a jury. A breach of contract claim customarily presents a legal issue and the remedy sought for this particular claim, damages in the form of backpay, is a legal remedy. Thus, I believe that under *Ross* the claim against Kroger was triable to a jury as a "legal" claim.[1]

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[1]In my opinion, these conclusions are not inconsistent with the Supreme Court's pronouncements in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Both cases involved § 301 hybrid actions, both involved statute of limitation questions, and in both the Court elaborated on the nature of hybrid § 301 actions. In *Mitchell*,

Accordingly, I would have held that the district court erred in denying in their entirety the motions to strike the plaintiffs' jury demand. In my opinion, the court instead should have granted the motions with regard to the fair representation claim and tried the issues inherent in that claim itself. Then, only if the court concluded that the arbitration award had to be set aside, which we hold today that it could not have been, should it have tried the breach of contract claim to a jury.

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the Court rejected the notion that a hybrid § 301 action could be characterized as a tort or contract action, stating that the action was "more analogous to an action to vacate an arbitration award than to a straight contract action." 451 U.S. at 62. In *DelCostello*, the Court maintained its view that a hybrid § 301 action is not analogous to a contract claim, but retreated from the "imperfect" view that it was analogous to an action to vacate an arbitration award. The Court instead analogized hybrid § 301 actions to unfair labor practice actions and therefore held applicable to hybrid § 301 actions the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act.

Neither *Mitchell* nor *DelCostello* apply in the present situation because both involved statute of limitation questions and therefore focused on the *overall* characterization of a hybrid § 301 action, rather than on the nature of the individual issues presented in such an action. Under *Ross*, the latter inquiry, and not the former, is clearly the proper focus in determining a Seventh Amendment question. *See Ross*, 396 U.S. at 538.